Supreme Court, U.S.
F I L E D
SEP 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1538

In the Supreme Court of the United States

October Term, 1984

ALEXANDRA FISHER, et al.,

Plaintiffs and Appellants,

v.

THE CITY OF BERKELEY, et al.,

Defendants and Appellees.

AMICUS CURIAE BRIEF OF THE CITIES OF SANTA MONICA, LOS ANGELES, PALM SPRINGS, WEST COVINA, WEST HOLLYWOOD, CAMARILLO, OXNARD, AND CATHEDRAL CITY IN SUPPORT OF APPELLEES

BEST AVAILABLE COPY

JAMES K. HAHN
City Attorney of Los Angeles
RAYMOND E. OTT
City Attorney of Cathedral City
COLIN LENNARD
City Attorney of West Covina and Camarillo
MICHAEL JENKINS
City Attorney of West Hollywood
K.D. LYDERS
City Attorney of Oxnard
WILLIAM J. ADAMS
City Attorney of Palm Springs

BURKE, WILLIAMS & SORENSEN
KATHERINE E. STONE
One Wilshire Building
Los Angeles, California 90017

ROBERT M. MYERS
City Attorney
STEPHEN S. STARK*
Assistant City Attorney
MARSHA JONES MOUTRIE
Deputy City Attorney
1685 Main Street
Santa Monica, California 90401
Telephone: (213) 458-8336

KARL M. MANHEIM
Loyola Law School
1441 W. Olympic Boulevard
Los Angeles, California 90015

*Counsel of Record

Attorneys for Amici

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTION PRESENTED

Whether local police power legislation, valid under state law and the Fifth and Fourteenth Amendments, conflicts with or is subject to the federal antitrust laws.

TOPICAL INDEX

Page

Question Presented i
Interest Of Amici 1
Summary Of Argument 2
1. The Berkeley Law Is Exempt Under The State Action Test 3
2. The Berkeley Law Is Not Preempted 3
3. Traditional Antitrust Analysis Is Inappropriate 3
Introduction 4

Argument

I.

Municipal Rent Controls In California Are Exempt From The Antitrust Laws Because Of Clearly Articulated And Affirmatively Expressed California Housing Policy 5
A. California Housing Policy Contemplates Local Rent Control 5
1. Cities Are Under A State Mandate To Provide For Adequate Housing 6
2. Rent Control Is A Recognized And Foreseeable Means Of Meeting State Requirements 8
B. The Decision Should Be Affirmed Under The Hallie Test 12

II.

The Berkeley Rent Control Law Is Not Preempted By The Sherman Act 14
A. The Antitrust Laws Were Not Intended To Preclude Local Police Power Regulation 14
B. A Municipal Regulation Is Preempted By The Sherman Act Only If It Mandates Conduct By Private Parties Which In All Cases Violates Federal Antitrust Law 17

III.

Principles Of Federalism Require Rejection Of The Per Se Rule In Assessing Police Power Regulations 18

A. The Per Se Rule Was Adopted For Traditional Private Market Agreements And Fails To Achieve Any Salutary Purpose Respecting Governmental Health And Welfare Regulations 18

B. The Per Se Rule Is Inapplicable Because Berkeley's Rent Control Law Does Not Constitute "Price-Fixing" 20

C. The Per Se Rule Does Not Apply In Cases Of First Impression 23

IV.

Principles Of Federalism Require Modification Of The Rule Of Reason To Accommodate Local Police Power Regulations 25

A. Commerce Clause Cases Provide An Appropriate Framework Of Analysis When Balancing The Benefits Of Local Regulations Against Their Impact On Commerce 26

B. Rent Control Does Not Unreasonably Burden Commerce 28

Conclusion 29

TABLE OF AUTHORITIES CITED

Cases Page

American Motors Sales Corp. v. Virginia Automobile Dealers, 592 F.2d 219 (4th Cir. 1979) 27

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 24

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) 15

Berman v. Parker, 348 U.S. 26 (1954) 5

Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976) 10, 13, 19, 29

Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) 23

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 17, 18, 20, 21, 22

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 16, 22

Capital Telephone Co. v. New York Telephone, 750 F.2d 1154 (2d Cir. 1984) 6

Cardio-Medical Ass'n v. Crozer-Chester Medical Center, 721 F.2d 68 (3d Cir. 1983) 28

City of Camarillo v. Spadys Disposal Service, 144 Cal. App. 3d 1027, 193 Cal. Rptr. 22 (1983) 8

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 12, 16

Construction Ind. Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) *cert. denied* 424 U.S. 934 29

Continental Oregon Co. v. Union Carbide Corp., 370 U.S. 690 (1962) 22

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 24

Cooley v. Board of Wardens, 12 How. 299 (1852) 27

Cotati Alliance for Better Housing v. City of Cotati, 148 Cal. App. 3d 280, 195 Cal. Rptr. 825 (1983) 8, 10

Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., 366 U.S. 127 (1961) 15
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 17
Ferguson v. Skrupa, 372 U.S. 726 (1963) 26
First American Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439 (8th Cir. 1983) *cert. denied* 464 U.S. 1042 (1984) 16
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 15
Hillsborough County v. Automated Medical Laboratories, Inc., ___ U.S. ___, 85 L. Ed. 2d 714 (1985) 14
Hines v. Davidowitz, 312 U.S. 52 (1941) 14
Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976) 27
Housing Authority v. Dockweiler, 14 Cal. 2d 437, 94 P.2d 794 (1939) 6
Huron Cement Co. v. Detroit, 362 U.S. 440 (1960) 26
Jetro Cash & Carry Ent. v. Food Distribution Center, 569 F.Supp. 1404 (E.D. Pa. 1983) 23-24
Joseph Seagram & Sons v. Hostetter, 384 U.S. 35 (1966) 17
Knight v. Halsthammar, 29 Cal. 3d 46, 171 Cal. Rptr. 704, 633 P.2d 288 (1981) 6
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 28
Mandeville Island Farms v. American Crystai Sugar Co., 334 U.S. 219 (1948) 27
Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1980) 6
Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925) 5
Morgan v. Division of Liquor Control, 664 F.2d 353 (2d Cir. 1981) 21
Nash v. City of Santa Monica, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984) *appeal dismissed* 84 L. Ed. 207 12
New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978) 27

Olsen v. Smith, 195 U.S. 332 (1904) 22
Parker v. Brown, 317 U.S. 41 (1943) 2
Philadelphia v. New Jersey, 437 U.S. 617 (1978) 28
Pike v. Bruce Church, 397 U.S. 137 (1970) 28, 29
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 17
Raymond Motors Transp. Co. v. Rice, 434 U.S. 429 (1978) 29
Rice v. Norman Williams Co., 458 U.S. 654 (1982) 3, 17, 20, 21
Russell v. United States, 53 U.S.L.W. 4652 (June 3, 1985) 28
Santa Monica Airport Ass'n v. City of Santa Monica, 481 F.Supp. 927 (C.D. Cal. 1979) *aff'd* 659 F.2d 100 (9th Cir. 1981) 19
Santa Monica Pines v. Rent Control Board, 35 Cal. 3d 858, 201 Cal. Rptr. 593, 679 P.2d 27 (1984) 10, 13
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 145 (1951) 18, 20, 21
Snyder v. Massachusetts, 291 U.S. 97 (1934) 22
Southern Motor Carriers Rate Conference v. United States, 471 U.S. ___, 85 L. Ed. 2d 36 (1985) 13, 16, 17-18
State of Missouri v. National Organization for Women, 620 F.2d 1301 (8th Cir. 1980) 15
Town of Hallie v. City of Eau Claire, ___ U.S. ___, 105 S.Ct. 1713 (1985) 2, 5, 11, 12, 13
Tripoli Company v. Wella Corporation, 425 F.2d 932 (3rd Cir. 1970) 15
United Mine Workers v. Pennington, 381 U.S. 657 (1968) 15
United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 25
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 5
Village of Euclid v. Ambler, 272 U.S. 365 (1926) 9
White Motor Co. v. United States, 372 U.S. 253 (1963) 23

Statutes

United States Code
Title 15, Section 35 4
Title 15, Section 3601 6
Title 42, Section 1441 6
District of Columbia Rent Control Act of 1973, 87 Stats. 623 (uncodified) 16
56 Stat. 23 (1942) 16
3 C.F.R. 602 (1971) 16

California Government Code
§6250 et seq. 13
§54950 et seq. 13
§65302 6
§65580 ..... 6, 7
§65580(d) 8
§65581(b) 6
§65581(c) 8
§65583 7
§65583(c) 9, 13
§65584 7
65587 7
§65589 ..... 10, 11
§65589(b) 10
§65755(a) 7
California Health & Safety Code
§1518 11
§33250 6
§50002 6
§50202 11
California Stats. ch. 1691 (1984) 6

Constitutions

United States Constitution
Fifth Amendment ..... i, 4, 19
Fourteenth Amendment ..... i, 4, 19
California Constitution
Article XI, Section 7 ..... 5, 10

Article XIIIA 9
Article XIIIB 9
Article XXXIV 9

Rules

Supreme Court Rule 36.4 1

Other Authorities

A Proposed Model of the Sovereign/Proprietary Distinction, 133 U. Pa. L. Rev. 661, 679-80 (1985) 22, 25
Areeda, *Antitrust Immunity for "State Action" After Lafayette,* 9 Harv. L. Rev. 435 (1981) 12
Baar, Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 721 11
Baar & Keating, *The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirements for Rent Control,* 7 Urb. Law. 447 (1975) 24
City of Los Angeles Rent Stabilization Division, *Rental Housing Study: Housing Production and Performance Under Rent Stabilization* (1984) 24-25
Handler, *The Current Attack on the Parker v. Brown State Action Doctrine,* 76 Col. L. Rev. 1 (1976) 15
Hovenkamp, *Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy,* 33 Hastings L.J. 325 (1981) 15
Keating, *Rent Control in California: Responding to the Housing Crisis,* 2-3 (1983) 24, 25
Longtin, *California Land Use Regulations* (1985 Supp.) 15-16 7
Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach,* 53 Fordham L. Rev. 23 (1984) 25
Parker v. Brown, A Preemption Analysis, 84 Yale L.J. 1164 (1975) 14

Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517 (1984) 24
K. Rosen, *California Housing Markets in the 1980's: Demand, Affordability, and Policies*, 29 (1984) 9, 25
Vanderstar, *Liability of Municipalities Under The Antitrust Laws: Litigation Strategies*, 32 Cath. U.L. Rev. 395 (1983)..... 16
Verkuil, *State Action, Due Process and Antitrust*, 75 Colum. L. Rev. 328 (1975)..... 16

No. 84-1538

In the Supreme Court of the United States

October Term, 1984

ALEXANDRA FISHER, et al.,

Plaintiffs and Appellants,

v.

THE CITY OF BERKELEY, et al.,

Defendants and Appellees.

AMICUS CURIAE BRIEF OF THE CITIES OF SANTA MONICA, LOS ANGELES, PALM SPRINGS, WEST COVINA, WEST HOLLYWOOD, CAMARILLO, OXNARD, AND CATHEDRAL CITY IN SUPPORT OF APPELLEES

INTEREST OF AMICI

The California cities of Santa Monica, Los Angeles, Palm Springs, West Covina, West Hollywood, Camarillo, Oxnard and Cathedral City, submit this brief pursuant to Supreme Court Rule 36.4 as amici curiae in support of Appellees and urge that the Berkeley Rent Control Ordinance be upheld and the judgment below affirmed. Each amicus has adopted rent controls or other police power regulations that would be affected by this Court's decision.

SUMMARY OF ARGUMENT

This facial antitrust case presents two main issues:

1. Whether California rent control ordinances are exempt from antitrust scrutiny under *Parker v. Brown*, 317 U.S. 41 (1943), and *Town of Hallie v. City of Eau Claire*, 471 U.S. ___, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985).

2. Whether the Berkeley rent control law on its face conflicts with Section 1 of the Sherman Act. This preemption analysis requires an examination of whether traditional antitrust approaches, such as the *per se* rule, are applicable to municipal police power legislation.

The California Supreme Court employed preemption principles at the threshold and, finding no conflict, upheld the law without reaching the exemption question. Amici contend that the Berkeley rent regulation and similar legislative acts not involving municipal market participation or combination with private parties should be upheld under both preemption and exemption approaches. Municipal antitrust analysis should respect accepted principles of federalism, promote speedy and efficient judicial review, and harmonize with other tests used to measure local laws in light of the Due Process, Equal Protection, and Commerce Clauses.

In *Hallie*, this Court refrained from requiring explicit authorization for particular anticompetitive municipal conduct in order to avoid "deleterious and unnecessary consequences" (*Id.* at 85 L. Ed. 2d 32): infringing local authority over basic land use issues, chilling legitimate attempts to experiment with solutions to complex social problems, and embroiling the federal courts in the interpretation of state statutes. This policy of restraint requires affirmance of the California Supreme Court's finding that there is no conflict between the Berkeley regulation and the antitrust laws. The novel application of antitrust law advocated by appellants would deprive municipalities of traditional and salutary tools for dealing with local land use and economic matters, and should be rejected by this Court.

1. The Berkeley Law Is Exempt Under The State Action Test.

In response to a severe statewide housing shortage, the California Legislature has required cities to plan for the provision of adequate affordable housing opportunities for all segments of the community. Cities must submit "Housing Elements" for state approval containing programs to meet statutory requirements. Rent control ordinances are foreseeable, practical, and recognized means of meeting these municipal obligations. Thus, even if there were a conflict in the abstract between rent control and the Sherman Act, this Court should rule that Berkeley's law is exempt because it furthers clearly articulated state policy.

2. The Berkeley Law Is Not Preempted.

The court below correctly decided that the Berkeley ordinance did not conflict with the Sherman Act because it does not require landlords to engage in anticompetitive activity and does not frustrate antitrust policy. *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982). Indeed, appellants failed to show any of the elements of a Sherman Act violation—an agreement, an effect on commerce, or an unreasonable restraint of trade. Moreover, Congress never intended that the antitrust laws would preclude local police power regulations.

3. Traditional Antitrust Analysis Is Inappropriate.

The *per se* rule, developed to deter private "price-fixing" agreements, would effectively prohibit local legislatures from formulating adequate responses to community problems. It would also preclude courts from using customary balancing approaches appropriate to social and economic cases. The rule of reason, also developed in the context of determining private business antitrust liability, should not be mechanically applied for the same reasons.

The California Supreme Court proposed a standard based on commerce clause cases, which is sufficiently flexible to

accommodate the interests of local government in promoting the public interest, yet has sufficient "teeth" to guard against improperly motivated municipal conduct that undermines the objectives of the federal antitrust laws. Amici urge this Court to either approve that test or adopt a similar approach allowing local governments to fulfill their responsibility to protect the public welfare.

INTRODUCTION

Within the American political system, cities are the closest layer of government to individual citizens. The responsibility for many social problems such as a shortage of affordable rental housing falls on municipal governments first and foremost. Federal and state housing policy encourages the provision of decent housing for all citizens. However, citizens expect (and in California, state law requires) local governments to adopt specific policies and implement actual solutions.

For decades state and federal courts have efficiently tested local land use ordinances for compliance with the requirements of the Fifth and Fourteenth Amendments. Strict judicial scrutiny of these regulations under federal antitrust laws neither achieves Congress' objective nor promotes the administration of justice. Mechanical application of antitrust rules developed in other contexts can only disable cities attempting innovative responses to complex contemporary problems.

Although the Local Government Antitrust Act of 1984 (15 U.S.C. Section 35) relieves potential catastrophic consequences in future cases, the spectre of standardless judicial oversight of the political process remains. Traditional antitrust scrutiny, intended to protect the consuming public, is appropriate where cities are acting as market participants. However, where cities are legislating to protect the public health and welfare, balancing the competing needs of various segments of the community, rigid antitrust scrutiny is neither appropriate nor required by the Sherman Act.

ARGUMENT

I.

MUNICIPAL RENT CONTROLS IN CALIFORNIA ARE EXEMPT FROM THE ANTITRUST LAWS BECAUSE OF CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED CALIFORNIA HOUSING POLICY.

Subsequent to the decision below, this Court clarified the contours of state-action immunity. *Town of Hallie v. City of Eau Claire,* 471 U.S. ___, 85 L. Ed. 2d 24 (1985). Since rent control was contemplated and foreseeable by the California legislature as a result of its clearly articulated and affirmatively expressed affordable housing policy, the Berkeley Ordinance is exempt under *Hallie.*

In California, the police power is reserved to cities by Article XI, Section 7 of the California Constitution. Unless an area is preempted by general state law, a city possesses the power to legislate broadly respecting the health, safety, and welfare of its citizens. The police power is elastic, intended to accommodate changing conditions and problems. *See Miller v. Board of Public Works,* 195 Cal. 477, 234 P. 381 (1925). *Accord, Berman v. Parker,* 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). Under the California Constitution, the Legislature need not specifically authorize the exercise of the police power respecting every area of municipal concern. Construing the antitrust laws to require the legislature to do so would destroy delicate allocations of power established by the state constitution.

A. California Housing Policy Contemplates Local Rent Control.

Consistent with constitutional constraints, the legislature frequently requires local governments to plan for the needs of their citizens and to implement solutions to a variety of social problems. The housing statutes exemplify the cooperative roles of state and local government. An examination of "the broad regulatory scheme, state judicial

decisions and recent legislation" (*Capital Telephone Co. v. New York Telephone,* 750 F.2d 1154, 1160 (2d Cir. 1984), *cert. denied* 85 L. Ed. 2d ___ (1985)) reveals that local rent controls further state housing policy.

1. Cities Are Under a State Mandate to Provide for Adequate Housing.

In California, "the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order." California Government Code Section 65580. This state goal is declarative of federal policy. California Health & Safety Code Section 50002; 15 U.S.C. Section 3601;[1] 42 U.S.C. Section 1441. The State's housing policy essentially promotes affordable housing opportunities; the need to provide persons of restricted income with basic housing has long been recognized by the California Legislature and courts. *See* California Health & Safety Code Section 33250; Cal. Stats. ch. 1691 (1984); *Housing Authority v. Dockweiler,* 14 Cal.2d 437, 450, 94 P.2d 794 (1939); *Knight v. Halsthammar,* 29 Cal.3d 46, 53, fn.3, 171 Cal. Rptr. 707, 623 P.2d 288 (1981); *Marina Point, Ltd. v. Wolfson,* 30 Cal.3d 721, 743, 180 Cal. Rptr. 496, 640 P.2d 115 (1982).

All California cities must adopt general plans with mandatory elements which address particular local concerns, e.g., transportation, circulation, land use, public safety, housing. California Government Code Section 65302. In 1980, the legislature adopted especially detailed requirements for housing elements; municipalities must "prepare and implement housing elements which, along with federal and state programs, will move toward attainment of the state housing goal." California Government Code Section 65581(b).

---

[1]"The Congress finds and declares that . . . there is a shortage of adequate and affordable housing throughout the Nation, especially for low- and moderate-income and elderly and handicapped persons." 15 U.S.C. Section 3601(a).

Cities must act to meet the needs and achieve the goals identified in their plans. Each housing element "shall make adequate provision for the existing and projected needs of all economic segments of the community." California Government Code Section 65583. A regional council of governments determines, based on projections prepared by the State, the existing and projected housing needs for the region and each local jurisdiction's fair share of the region's affordable housing opportunities. California Government Code Section 65584. Local governments must design, schedule, and execute programs to preserve and produce housing. *See generally,* Longtin, *California Land Use Regulations* (1985 Supp.) at 15-16.

The housing element statutes throughout, particularly Government Code Sections 65580 and 65583, contemplate that cities must provide housing for low- and moderate-income persons. The legislative mandate that local governments use their powers to implement the state housing goal is fortified with severe penalties for cities that do not adopt adequate housing elements.[2] The housing element must be submitted to the State Department of Housing and Community Development for review prior to adoption or amendment. California Government Code Section 65583. Judicial review of the adequacy of the housing element is available pursuant to Section 65587.

Berkeley's Housing Element identifies the City's housing needs (as determined by the regional council of governments); expresses goals and policies consistent with state housing goals; and establishes quantified objectives and scheduled programs. Accordingly, the Rent Control Ordinance addresses the City's housing crisis and advances its affordable housing policies (Sections 2-3, App. G at A-110-12).

The California Legislature appreciates that "each locality is best capable of determining what efforts are required by

---

[2]*See, e.g.,* California Government Code Section 65755(a) (the state may suspend cities' authority to issue building permits, grant variances, or subdivision approvals if the housing element is inadequate).

it to contribute to the attainment of the state housing goal, provided such determination is compatible with the state housing goal and regional housing needs." California Government Code Section 65581(c). The Legislature specified that "local . . . governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community." California Government Code Section 65580(d). *See also City of Camarillo v. Spadys Disposal Service,* 144 Cal. App. 3d 1027, 1031, 193 Cal. Rptr. 22, 24 (1983) (municipalities require "the flexibility to adapt statewide directives to local circumstances").

The statutes requiring cities to prepare and implement housing elements were not intended to grant new powers to cities or take away powers they already have; they require cities to use their existing powers and focus them upon the state-mandated goal of meeting the housing needs of all economic segments of the community.

2. Rent Control Is A Recognized And Foreseeable Means Of Meeting State Requirements.

The constraints facing municipalities when complying with state requirements are relatively immutable. The shortage of land and the inability of existing infrastructure to support population density impose serious limitations.

> In the last ten years urban areas in California have begun to find essentially all vacant land filled, with little or no vacant space for the installation of additional housing. In many of California's largest cities virtually no empty space exists which is available for additional housing. Given California's continued population growth, it is just a matter of time before remaining vacant space will be exhausted in every major city in California. *Cotati Alliance For Better Housing v. City of Cotati,* 148 Cal. App. 3d 280, 292-93, 195 Cal. Rptr. 825, 833 (1983).

Further, the California Constitution severely limits increases in local taxes (California Constitution Article XIIIA), and requires voter approval for increases in spending (California Constitution Article XIIIB) and government operated housing projects (California Constitution Article XXXIV). Federal and state funding for municipal housing programs is by no means unlimited. The Legislature is well aware of these constraints. It knows that a city cannot solve its housing problems by simply constructing public housing and therefore expressly recognizes alternatives including "the administration of land use and development controls." California Government Code Section 65583(c). Indeed, there is no doubt that the protracted and severe housing problems in California defy easy solution.

Local governments must rely on the private sector to provide the vast bulk of affordable housing for their residents, including senior citizens, minorities, and persons of restricted income. Given the high cost of land, construction, and financing, which limit new construction and impair home ownership opportunities, and the low vacancy rate creating a "seller's market" in rental housing,[3] it is necessary for local governments to carefully consider the remaining options in order to meet state obligations. Police power regulation of land use has been one of those options at least since *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

The State Legislature has identified the problem; it has required local governments to address the problem by specific programs designed to meet a fair share of regional needs. Yet the Legislature has not directed any particular solutions. Rather, it has recognized that cities will use their historic and constitutional police powers to preserve and protect affordable housing opportunities. Reasonable rent control ordinances are among these recognized tools available to cities addressing their housing element obligations. Their continued use is foreseeable if not inevitable.

---

[3] *See* K. Rosen, *California Housing Markets In The 1980s: Demand, Affordability and Policies* 48, 57 (1984) (California vacancy rate "is about 2%, less than one-third the national average").

> Unless and until the Legislature determines this issue to be a proper subject of general state law, local government will be under increasing pressure to adopt rent control as a means of protecting its citizens from excessive rent resulting from increased shortages of residential housing. *Cotati Alliance For Better Housing* v. *City of Cotati,* 148 Cal. App. 3d 280, 292-93, 195 Cal. Rptr. 825, 833 (1983).

In California, rent control is a valid exercise of the municipal police power and requires no additional state enabling authority. *Birkenfeld* v. *City of Berkeley,* 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976); *Santa Monica Pines* v. *Rent Control Board,* 35 Cal. 3d 858, 201 Cal. Rptr. 593, 679 P. 2d 27 (1984) (rent control, with "evident independent police power basis," not preempted by state law). When the Legislature amended the planning laws in 1980, it foresaw the use of existing local powers to enact rent control in order to meet the state housing goal:

> Nothing in this article [Housing Elements] shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls. . . . California Government Code Section 65589(b).

While Section 65589 is neutral on its face, in context it constitutes a legislative recognition that cities would continue to use rent control ordinances.[4] The legislature has withdrawn

[4]In light of *Birkenfeld,* a "grant of authority" would have been superfluous. There, the California Supreme Court held that local authority to enact rent control springs from the constitution and not from the legislature. *Id.* at 140, 130 Cal. Rptr. at 473. Moreover, California Government Code Section 65589 was passed at a time when Proposition 10 of 1980 was on the statewide ballot. Proposition 10 would have amended Article XI, Section 7 of the California Constitution to substantially restrict the authority of California cities to adopt rent control. Thus, Section 65589 expresses a legislative intent that amendment of the State Planning Law not be interpreted to enlarge the authority of cities if Proposition 10 passed, or repeal existing constitutional authority of cities if

local authority to implement rent control in very limited instances. With respect to state-subsidized housing projects, housing sponsors or developers "so regulated shall not otherwise be subject to controls on rent imposed by any state or local public agency or other local public entity." California Health & Safety Code Section 50202. In this context, the Legislature has recognized state subsidy as an alternative to local rent controls. And by tacitly approving them, the legislature has also recognized that rent controls are employed where state subsidies are not provided. Similarly, with respect to community care facilities, which are subject to detailed state regulation of rates and services, the Legislature has specified that local rent controls shall not apply. California Health & Safety Code Section 1518.

In the past decade, nearly 50 California cities have implemented rent control laws.[5] Opponents of rent control have unsuccessfully importuned the Legislature and the electorate on numerous occasions to withdraw local authority in this area. The voters of the state rejected Proposition 10 of 1980, which would have drastically restricted the types of rent control permissible. Various bills have been introduced in the Legislature to the same effect; none have passed.[6]

In the language of *Hallie,* these events and "statutory provisions plainly show that 'the legislature contemplated the kind of action complained of.' " *Id.* at 85 L. Ed. 2d 33.

Proposition 10 failed (which it did). Thus, Section 65589 does not reflect a legislative policy on the authority for rent control, but a deference to the electoral process and to home rule.

[5]Other urban areas have enacted rent controls in response to persistent and serious housing shortages. Over 100 cities in New Jersey, as well as cities in Massachusetts and New York, and the District of Columbia have rent control. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade,* 35 Rutgers L. Rev. 721, 725 ("approximately 10% of all privately owned residential rental units in the United States are subject to some form of rent control").

[6]Two bills limiting the scope of municipal rent control were introduced in the California legislature in its most recent session.

B. The Decision Should Be Affirmed Under The *Hallie* Test.

The California legislature's requirement that cities plan for and provide a fair share of affordable housing by means including police power legislation is a far cry from "mere neutrality" or general home rule authorization found insufficient to warrant exemption in *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982). By establishing the mandatory ends without limiting permissible means, and by mentioning rent control and encouraging cities to exercise their reserved police powers toward achieving the required goals, the State has "clearly articulated and affirmatively expressed State policy" embracing rent control. *Hallie* at 85 L. Ed. 2d 32. *See also* Areeda, *Antitrust Immunity for "State Action" After Lafayette,* 9 Harv. L. Rev. 435, 446 (1981) ("a policy to displace the antitrust laws will then be inferred if the challenged restraint on competition is a necessary or a reasonable consequence of engaging in the authorized activity").

Hallie determined that the "clear articulation" prong of the state action test does not require state compulsion and concluded that the "active state supervision" prong should not be imposed where the actor is a municipality. 85 L. Ed. 2d at 34. This clarification of the state action exemption reflects a carefully developed policy that apparently anticompetitive activity takes on a different complexion when adopted by local government. *See Community Communications Co. v. City of Boulder,* 455 U.S. 40, 56, n.20 (1982).[7]

A.B. 483 (Costa) would restrict municipal authority in certain areas of rent control. This bill passed the Assembly, but was not voted on in the Senate and was carried over to the next session. S.B. 505 (Ellis) would override *Nash v. City of Santa Monica,* 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984) app. dismissed ___ U.S. ___ 84 L. Ed. 2d 807 (1985), which upheld portions of Santa Monica's rent control law. This bill passed the Senate, and has been approved by the Assembly Judiciary and Ways and Means committees with amendments. The bill is pending in the Assembly.

[7]The notation in *Hallie* that "where state or municipal regulation of a private party is involved . . . active state supervision must be shown. . . .", *Hallie* at 85 L. Ed. 2d at 34, n.10, should not be interpreted to mean that a municipality is exempt if it is an actor but requires supervision if it is a regulator. Rather, the footnote seems to underscore the difference between the exemption of government agencies and private parties. The note refers to the Court's companion decision of *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. ___, 85 L. Ed. 2d 36 (1985), which concluded that the private rate-setting at issue was exempt because the states concededly "actively supervised the conduct of private parties." *Id.* at 51. *See id.* (Stevens, J. dissenting).

The California police power is characterized by its dynamic nature, its balancing of local control against statewide concerns, and its prerequisite of public participation in the legislative process. *See Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P. 2d 1001 (1976) (rent control reflects response to changing problems under elastic police power); *Santa Monica Pines v. Rent Control Board,* 35 Cal. 3d 858, 201 Cal. Rptr. 593, 679 P. 2d 27 (1984) (rent control coexists with state subdivision laws); California Government Code Section 54950 *et seq.* (open meeting law); Section 6250 *et seq.* (public records act); and Section 65583(c) (public participation by all economic segments of the community in housing element process). In home rule jurisdictions like California, legislative authorization is inherently broader than in states where cities cannot exercise police power without specific state approval. The California Constitution rejects detailed oversight of local affairs as a matter of both principle and practical necessities of government.

Thus, the test for "authorization" should be sufficiently flexible to permit home rule cities to protect their residents without going to the state legislature in every instance. The concept of foreseeability enunciated in *Hallie* meets these concerns. Where the State Constitution and State Legislature recognize the role of cities as initiators of legislative policy and the Legislature has directed municipal governments to design solutions to particular areas of statewide concern, sufficient authorization exists to immunize resulting local legislation from antitrust scrutiny.

II.

THE BERKELEY RENT CONTROL LAW IS NOT PREEMPTED BY THE SHERMAN ACT.

For appellants to prevail in this case, they not only must establish the inapplicability of the state action exemption, but also must prove that Berkeley's law is preempted by the Sherman Act under the Supremacy Clause. However, the "familiar and well-established" principles of preemption (*Hillsborough County v. Automated Medical Laboratories, Inc.*, ___ U.S. ___, 85 L. Ed. 2d 714, 721 (1985)) indicate to the contrary.

Appellants primarily base their preemption argument on the most general ground: local law is "indirectly" preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id., quoting Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Appellants' reason for relying on the *Hines* rule of preemption is clear. They are unable to make out a prima facie antitrust case. They are unable to show either express preemption or that Congress otherwise intended to foreclose state and local economic regulation. Indeed, they are even unable to establish implied preemption under *Hines*.

A. The Antitrust Laws Were Not Intended To Preclude Local Police Power Regulation.

Appellants rest their case on a commercial ideal of unfettered market pricing and an unregulated economy. Their nineteenth century notions of the marketplace read into the Sherman Act an intent to forbid any regulation, save those exempt under their narrow construction of the *Parker* doctrine. Yet, "neither the legislative history of the Sherman Act nor the opinions of the Court require the Sherman Act to be exclusive of all other regulation. . . . Rather, the antitrust laws are an interstitial system, an attempt to regulate competition as one aspect of economic life." Note, *Parker v. Brown, A Preemption Analysis,* 84 Yale L.J. 1164, 1170 (1975).

Appellants broadly overstate the purpose and policy of Congress in enacting the antitrust laws. They were not intended to deal with police power matters. *Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519, 530-31 (1983) ("Congress intended the Act to be construed in the light of its common law background"). "The Sherman Act was never intended to outlaw surrogate methods of social and economic controls in place of enforced competition." Handler, *The Current Attack on the Parker v. Brown State Action Doctrine,* 76 Col. L. Rev. 1, 15 (1976).

While the antitrust statutes do recognize the value of price competition in protecting the consuming public (*see, e.g., Associated General Contractors*), courts have repeatedly held that the public has other interests beside unregulated competition. *See Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 138 (1961) (First Amendment rights and political activity); *United Mine Workers v. Pennington* 381 U.S. 657 (1965) (labor activity and lobbying); *Goldfarb v. Virginia State Bar* 421 U.S. 773, 788-789, n.17 (1975) (professional standards and self-regulation); *Tripoli Company v. Wella Corporation,* 425 F.2d 932, 938 (3rd Cir. 1970) (protection of consumers and public safety); *State of Missouri v. National Organization for Women,* 620 F.2d 1301, 1309 (8th Cir. 1980) ("the indication is that it was the competitors in commerce that Senator Sherman had in mind as the concern of his bill, not noncompetitors motivated socially or politically in connection with legislation").

Like rights of expression or association and professional or public safety regulation, the alleviation of the effects of housing shortages furthers the public interest. Land use controls are well outside the field covered by federal antitrust laws. *See* Hovenkamp, *Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy,* 33 Hastings L.J. 325, 335 (1981).

The objective of rent control is not competition, but the redress of severe housing shortages which are inimical to public health and safety. If such municipal concerns were proscribed by the Sherman Act, Congress and the courts might have to assume plenary responsibility in areas not contemplated by the Act's authors.

Judicial interventionism in this area would invite the sort of standardless review that conflicts with policies of judicial economy and restraint. *See Community Communications Co. v. City of Boulder,* 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting); *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 640 (1976) (Stewart, J., dissenting); *First American Title Co. v. South Dakota Land Title Ass'n,* 714 F.2d 1439, 1453 (8th Cir. 1983), *cert. denied* 464 U.S. 1042 (1984) ("this type of judicial inquiry by the federal courts has long been repudiated in the context of due process"); Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies,* 32 Cath. U.L. Rev. 395, 398 (1983); Verkuil, *State Action, Due Process And Antitrust,* 75 Colum. L. Rev. 328, 333 (1975).

Moreover, with recent cases as a guide, preemption by the Sherman Act requires far more than some theoretical secondary impact on the ideal of competition—the most that is present here. Rather, direct conflict is required. It cannot be shown here.[8]

---

[8]It is clear that Congress itself does not view local rent controls as incompatible with the Sherman Act. *See* District of Columbia Rent Control Act of 1973, 87 Stats. 623 (uncodified). There, Congress specifically empowered the District of Columbia Council to enact such rent controls as are "necessary and appropriate." It would appear rather anomalous for Congress to specifically authorize rent controls if such would "stand as an obstacle" to the antitrust laws. *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. ___, 85 L. Ed. 2d 36, 47 n.22 (1985) ("We think it unlikely that Congress intended to prevent the States from adopting [policies] virtually identical" to Congress'). Congress also enacted rent controls during both world wars (*see* 56 Stat. 23 (1942)), and rent controls were established by President Nixon on August 15, 1971. *See* Exec. Order No. 11615, 3 C.F.R. 602 (1971).

B. A Municipal Regulation Is Preempted By The Sherman Act Only If It Mandates Conduct By Private Parties Which In All Cases Violates Federal Antitrust Laws.

This Court has expressly rejected the proposition that any regulation with anticompetitive effects is automatically preempted by the Sherman Act. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978). There, gasoline producers claimed that a regulation prescribing market participation was "in conflict with the basic federal policy in favor of competition." *Id.* at 129. The Court responded:

> This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. *Id.* at 133.

See Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978) ("we start with the assumption that the historic police powers of the States [are] not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress").

Rather, in antitrust cases, preemption will be found only in the event of direct and "irreconcilable" conflict. *Rice v. Norman Williams Co.,* 458 U.S. 654, 659 (1982); *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978); *Joseph Seagram & Sons v. Hostetter,* 384 U.S. 35 (1966). A state or local statute irreconcilably conflicts with federal antitrust policy where it mandates private conduct that is violative of federal law. *Rice v. Norman Williams Co.,* 458 U.S. 654, 661-62 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980); *Southern Motor*

Carriers Rate Conference v. United States, 471 U.S. ___, 85 L. Ed. 2d 51, 57 (1985) (Stevens, J., dissenting).

Appellants contend that the elements of a prima facie case need not be proven here. Yet *Rice* establishes that, particularly in facial challenges, a violation of the federal antitrust laws must be *compelled* by local regulation. Appellants claim they are "compelled" to violate federal law when they charge a prescribed rent, but the cases on which they rely require far more than that for "conflict." Rather, the private party must be compelled to "follow a parallel price policy" (*Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 389 (1951)), or "form a combination and endeavor to [vertically control prices] by agreement" (*California Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97, 103 (1980)), or engage in some other activity that itself constitutes a violation of antitrust law. Thus, for local regulation to be preempted because it compels private parties to "violate" the Sherman Act, each element of a prima facie case must be proven, including agreement and restraint. Appellants' use of the per se rule avoids these critical elements.

III.

PRINCIPLES OF FEDERALISM REQUIRE REJECTION OF THE PER SE RULE IN ASSSESSING POLICE POWER REGULATIONS.

The per se rule is hostile to federalism. It ignores the distinctions between private and governmental impact on the economy. It constrains the role of the courts in balancing competing interests. It achieves expediency at a very high cost.

A. The Per Se Rule Was Adopted For Traditional Private Market Agreements And Fails To Achieve Any Salutary Purpose Respecting Governmental Health And Welfare Regulations.

The per se rule is intended to deter secret restraints on trade by private cartels. The rule not only furthers the will of Congress in condemning economic predations known at

common law, but promotes judicial economy by obviating the need for extensive trials of economic opinions and justifications where a practice has been proven to be among the evils that Congress intended to prohibit.

In cases of government regulation, neither policy justifying the per se rule is furthered. Application of the rule would deter government innovation in local matters. And the rule does not promote judicial economy, as local ordinances are already subject to far ranging judicial scrutiny including inquiry into their effect on interstate trade under the commerce clause.

Especially in the land use context, numerous tests exist to protect individuals from abuse of governmental power. These range from state open meeting and environmental review requirements to Fifth and Fourteenth Amendment protections. While courts pay substantial deference to local judgments as to the wisdom of economic legislation not affecting fundamental rights, they do not hesitate to strike laws that impermissibly burden individuals (*Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976) (first Berkeley rent control law violated due process)) or the nation's economy (*Santa Monica Airport Ass'n v. City of Santa Monica,* 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd,* 659 F.2d 100 (9th Cir. 1981) (ban on jet aircraft held violative of equal protection and commerce clauses)).

Against this background, the true nature of appellants' complaint should be examined. Their real grievance is the claimed insufficiency of their profits. They do not allege denial of access to markets,[9] predatory practices, prejudice to consumers of housing services[10] or any other ill effect on

---

[9]The Berkeley law, like most other rent control laws, exempts new construction. Notwithstanding this exemption, appellants claim that Berkeley's Ordinance stifles construction. This assertion deserves no credence in a facial case.

[10]Appellants' feigned concern for the inability of renters to "compete for housing" in Berkeley is easily dismissed. First, appellants lack *jus tertii* standing. Second, it is not the price control

commerce. Instead, the gravamen of their case is that their property is being over-regulated--an issue cognizable by courts under familiar standards.

Although use of the per se rule might give appellants a "quick fix," in the long run, settled constitutional standards will continue to be the principal mechanism for review of land use and economic regulation. Appellants' unprecedented use of the per se rule out of its ordinary context promotes multiplicity of litigation but impedes judicial economy. It disrupts the orderly development of the antitrust laws and handcuffs cities in critical land use areas.

B. The Per Se Rule Is Inapplicable Because Berkeley's Rent Control Law Does Not Constitute "Price-Fixing."

Appellants assert that "governmentally imposed price-fixing" has been uniformly condemned by this Court under the per se rule because "it demands private conduct which the Sherman Act forbids" (Opening Brief at 19) (citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951)). They further rely on *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980); and *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), for the proposition that "price-regulation" by government is no different than "price-fixing" by market participants. Appellants misread these cases and, by doing so, ignore salutary differences. They cannot avoid proving the elements of a Section 1 case by the simple expedient of reciting the magic words "price-fixing."

The common denominator of *Midcal* and *Schwegmann* is that in each case the private parties set the prices; the state simply enforced private anticompetitive arrangements. In *Schwegmann*, the distributor enforced a private market restraint by using the state statute as a "club." 341 U.S. at

---

aspect of Berkeley's law which "disfavors" incoming tenants. It is the eviction controls which confer tenant security against arbitrary displacement.

395. In *Midcal*, this Court reiterated the holding of the California Supreme Court, which had observed:

> the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests. . . . *Id.* at 100-101.

Actual or constructive private agreements to restrain trade, obviously running afoul of the Sherman Act, are not equivalent to government regulated prices. Indeed, they are the opposite. The market restraints in *Schwegmann* and *Midcal* had all the characteristics (and likely the same intent) as private agreements among producers and distributors.

> The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. *Midcal* at 445 U.S. 106.

But where prices are controlled by governmental action, the ingredient of market restraint is only half the story. The degree of government's involvement in the price setting is critical in selecting the appropriate analysis.

> The [California designation] statute contemplates a private market decision but provides a nonmarket mechanism for enforcing the decision. Hybrid restraints of this character require analysis that is different from a public regulatory scheme on the one hand, and a purely private restraint on the other. *Rice v. Norman Williams Co.*, 458 U.S. 654, 665 (1982) (Stevens, J., concurring) (citations omitted).

See Midcal at 445 U.S. 106, n.9 (contrasting governmental enforcement of private market schemes with state control of the market).

Thus, in *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), the state of Connecticut had regulated the price of alcoholic beverages and set minimum prices for

wholesalers and retailers. Plaintiffs contended that the scheme constituted resale price maintenance of the kind found unlawful in *Midcal.* However, the court noted a crucial distinction between the California and Connecticut schemes.

> In contrast [to California], the State of Connecticut establishes the markup and does not permit private parties to engage in resale price maintenance. . . . Unlike the California statute in *Midcal,* the Connecticut statutes do not authorize or compel private parties to enter contracts or combinations to fix prices in violation of Section 1 of the Sherman Act. 664 F.2d at 355.

Where government influence on other parties has been involved in antitrust cases, this Court has recognized that affected private parties may be found to violate the antitrust laws only where they act voluntarily.[11] *See, e.g., Cantor v. Detroit Edison Co.,* 428 U.S. 579, 592, 594-95 (1976); *Continental Oregon Co. v. Union Carbide Corp.,* 370 U.S. 690, 706-07 (1962); *Olsen v. Smith,* 195 U.S. 332 (1904). Appellants' argument would create a conspiracy for antitrust purposes wherever a private party obeyed the law. This is simply untenable in light of common sense and case law.

Consistent with Justice Cardozo's admonition that "a fertile source of perversion in constitutional theory is the tyranny of labels," (*Snyder v. Massachusetts,* 291 US 97, 114 (1934)), this Court has recognized the pitfalls of the tag "price-fixing."

> As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." . . . Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing." That will often, but not always, be a simple matter. *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 U.S. 1, 9 (1979).

[11]Even where agreement is obtained by coercion, there must be an analytical difference between private and governmental conduct. Coercion by private individuals is illegal, whereas coercion (through the enforcement of law) is not only customary for governments, it is their means of operation. *See* Comment, *A Proposed Model of the Sovereign/Proprietary Distinction,* 133 U. Pa. L. Rev. 661, 679-80 (1985). If every coercive governmental action, such as a zoning law geographically allocating the market, were sufficient to satisfy the conspiracy requirement of Section 1, there would not be much substance left to that requirement.

Appellants mistakenly treat local governments as economic actors subject to the same scrutiny as profit-making private business activity. They compound this mistake by measuring government action against the standard of actors operating in a theoretical, wholly unregulated market. These false assumptions lead to the impossible conclusion that government cannot act if its action would affect the economy.

C. The Per Se Rule Does Not Apply In Cases Of First Impression.

It is firmly established that the per se rule may not be used in a novel antitrust case. *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 U.S. 1, 19 (1979) (restraint will be deemed illegal per se only after courts have considerable experience with that type of behavior); *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963) ("we need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' ").

As Justice Brennan noted in his concurrence in *White Motor,* to employ the per se rule in a novel case, the court "must determine whether experience warrants, at this stage, a conclusion that inquiry into effect upon competition and economic justification would be . . . irrelevant." *Id.* at 265-66. *See also Jetro Cash & Carry Ent. v. Food Distribution*

Center, 569 F. Supp. 1404, 1413 (E.D. Pa. 1983) (The *per se* rule is drastic and is only used "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.")

It is far from accepted that rent control in and of itself negatively affects competition in the rental market.[12] The impact of rent control's restraint on competition should be evaluated by its "demonstrable economic effect." *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 59 (1977). *See also Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 362 (1982) (Powell, J., dissenting). This evaluation, however, has yet to be done. The evidence concerning the impact of rent control on the rental market, i.e., the quantity and quality of rental housing, has been, and remains, uncertain.

> Rent stabilization did not occur in a vacuum, nor are its impacts worked out in a constant environment. Housing markets in most market economies are volatile and subject to many influences. The demand for housing and its supply, both for rental and ownership, are deeply affected by larger forces in the economy and society. Some of these factors are relatively easy to identify and trace. Others are obscure and not obvious at first sight. City of Los Angeles Rent Stabilization Division, *Rental Housing Study: Housing Production and Performance Under Rent Stabilization* (1984) at 11.

[12]There is considerable controversy over the economic effects of rent control. *See e.g.,* Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences* 69 Cornell L. Rev. 517, 581 (1984) (rent control does not discourage housing construction); Baar & Keating, *The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control,* 7 Urb. Law. 447, 491 fn. 209 (1975) (myth that rent control automatically results in drastic reduction of housing construction or undermaintenance of housing stock has been disproven); Keating, *Rent Control in California: Responding to the Housing Crisis,* 17 (1983) (no evidence of negative effects of California rent control).

What is known, however, is that rental housing in California is in such a crisis state that it does not respond to normal market forces. K. Rosen, *California Housing Markets in the 1980's: Demand, Affordability, and Policies* 48, 57 (1984). In a responsive, efficient market an increase in rental housing demand should cause an increase in supply; the current housing shortage indicates that the supply of housing has not responded to renter demand. *See* Keating, *Rent Control in California: Responding to the Housing Crisis* 2-3 (1983). The inelasticity of supply allows landlords to increase housing rents to reduce demand. *See* Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach,* 53 Fordham Law Review 23, 54-55 (1984). It is the essence of government's "role in our free market system to correct market failures." Comment, *A Proposed Model of the Sovereign/Proprietary Distinction,* 133 U. Pa. L. Rev. 661, 678 (1985).

The conclusions of the studies of the effects of rent control on rental quality and quantity vary at the extremes. No one knows the "demonstrable economic effect" of rent control. Whether or not it restrains competition remains an open question on which economists, lawyers, and government officials frequently disagree. Application of the per se rule on the barren record before this Court is tantamount to asking for judicial notice of rent control's supposed anticompetitive effects, inviting the Court "to ramble through the wilds of economic theory. . . ." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 609 n.10 (1972).

IV.

PRINCIPLES OF FEDERALISM REQUIRE MODIFICATION OF THE RULE OF REASON TO ACCOMMODATE LOCAL POLICE POWER REGULATIONS.

The appropriate standard under the antitrust laws should be consistent with those applied in other challenges to land use and other economic regulation. The primary constitu-

tional guarantees—due process and equal protection—are satisfied when public bodies have a reasonable basis for regulation. "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa,* 372 U.S. 726, 729 (1963).

In preemption and Commerce Clause cases, courts attempt to reconcile legislative schemes and balance local and federal interests. *Huron Cement Co. v. Detroit,* 362 U.S. 440 (1960). Ouster of local laws under the supremacy clause is disfavored; regulations must be proven to be in direct conflict with federal law or plainly repugnant to policy. Similarly, local regulations will not be invalidated under the commerce clause unless they directly and substantially burden commerce and the putative local benefits are substantially outweighed by the negative impacts on commerce.

These carefully considered and hard-won limitations on economic regulations would be irrelevant if, contrary to settled practice, the per se rule or mechanical application of the rule of reason authorized courts to reconsider the wisdom of legislation.

A. Commerce Clause Cases Provide An Appropriate Framework Of Analysis When Balancing The Benefits Of Local Regulations Against Their Impact On Commerce.

The per se rule and rule of reason are defective when applied to municipal regulation in that they cannot accommodate valid governmental interests underlying health and welfare regulations. As the California Supreme Court recognized, it is unnecessary to search for new tools that accommodate both the national interest in a free economy and the local interest in addressing specific social problems. There is an existing approach for balancing the effects of local regulation on commerce against their putative social benefits. Local regulation with adverse extraterritorial effects may be found invalid under the commerce clause as imposing an unreasonable burden on interstate commerce. *Huron Cement Co. v. Detroit,* 362 U.S. 440 (1960).

The policies underlying antitrust and commerce clause scrutiny are parallel. In both cases, the concern is with direct interference with the free flow of the nation's economy. Ever since *Cooley v. Board of Wardens,* 12 How. 299 (1852), this Court has construed the "great silences of the Constitution" as limiting state and local authority to regulate and interfere with interstate commerce. But the commerce clause does not constrain private actors who obstruct commerce; the Sherman Act accomplishes that goal. In some respects, application of the Sherman Act to local health and safety regulation duplicates judicial scrutiny already available; it has essentially the same ends. Accordingly, incorporating the familiar commerce clause standard into antitrust challenges to local laws serves the dual goals of federalism and judicial economy.

Cases under the Sherman Act often speak of restraints "unreasonably burdening interstate commerce," the classic commerce clause test. *See, e.g., Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219, 234 (1948); *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 746 (1976). Other cases have merged the tests under the commerce clause and Sherman Act for determining the requisite impact on interstate commerce. For instance, in *American Motors Sales Corp. v. Virginia Automobile Dealers,* 592 F.2d 219 (4th Cir. 1979), the court analyzed *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96 (1978), an antitrust case, in determining that a state statute did not unconstitutionally burden commerce. At issue in the two cases were similar regulatory schemes involving automobile distributorships.

> Although *[Fox]* was testing the California law under the due process clause and the Sherman Act, the Court's recognition of the legitimacy of state regulation designed to protect those interests is pertinent to our [commerce clause] inquiry here. 592 F.2d at 223.

See also Philadelphia v. New Jersey, 437 U.S. 617, 621-22 (1978) (rejecting a broader notion of "commerce" when Congress has acted than when the commerce clause operates directly on the states); *Cardio-Medical Ass'n v. Crozer-Chester Medical Center,* 721 F.2d 68, 76 (3d Cir. 1983) (court equated burdens on interstate commerce under the commerce clause with conduct that violates federal antitrust policy).

By this approach, decades of commerce clause jurisprudence can be used to guide municipal antitrust developments. Whether the inquiry into economic effects is cast in terms of the commerce clause or the Sherman Act, the quality of the local interest and the "reasonableness" of the burden should be a legitimate concern in evaluating challenges to local regulation.

B. Rent Control Does Not Unreasonably Burden Commerce.

Under our constitutional scheme, the States retain authority under the police power to regulate matters of "legitimate local concern" when interstate commerce is affected. *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 36 (1980). The commerce clause permits local regulation unless its effects are so burdensome as to fall within the negative implications of the clause. The general rule is described in *Pike v. Bruce Church,* 397 U.S. 137 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.[13] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will

[13]Assuming arguendo rent control's effect on commerce is sufficient for jurisdictional purposes (*Cf. Russell v. United States,* 53 U.S.L.W. 4652 (June 3, 1985)), this in no way suggests that it so burdens commerce as to be invalid.

> be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 142 (citations omitted).

Moreover, the subjective balancing test of *Bruce Church* has evolved to a more specific test where matters of local concern are involved. The regulation of public health, safety, and welfare under the police power is such a local concern. *See Raymond Motors Transp. Co. v. Rice,* 434 U.S. 429, 443 (1978); *Construction Ind. Ass'n of Sonoma County v. City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976).

California courts have repeatedly held that rent control is rationally related to the general welfare of the community. *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129, 160, 550 P.2d 1001, 130 Cal. Rptr. 465, 488 (1976). Local rent controls are non-discriminatory and do not "disrupt" any required uniformity in, or otherwise burden, interstate commerce. To the extent the converse is necessary to appellants' case, they must be put to their proof.

CONCLUSION

A reversal in this case would have a severe impact beyond its rent control context. It would require cities to seek specific enabling authority from the state legislature for a wide variety of regulations that could be labeled as "restraints on trade." Laws regulating the time, place, and manner of conducting business, long a key facet of municipal regulation, would be vulnerable to antitrust invalidation unless the state legislature specifically authorized their adoption. Land use regulation, essentially intended to protect the character of communities, might similarly require state approval.

For nearly a century, the antitrust statutes have protected consumers from the results of unregulated markets. It would be ironic indeed if the Sherman Act was stood on its head to prevent government regulation of the marketplace for the

public benefit. This Court should dismiss the mechanical, unprecedented, and opportunistic application of the antitrust statutes attempted here.

Respectfully submitted,

ROBERT M. MYERS
City Attorney of Santa Monica
STEPHEN S. STARK*
Assistant City Attorney
MARSHA JONES MOUTRIE
Deputy City Attorney
JAMES K. HAHN
City Attorney of Los Angeles
RAYMOND E. OTT
City Attorney of Cathedral City
COLIN LENNARD
City Attorney of West Covina and Camarillo
MICHAEL JENKINS
City Attorney of West Hollywood
K.D. LYDERS
City Attorney of Oxnard
WILLIAM J. ADAMS
City Attorney of Palm Springs
KARL M. MANHEIM
Loyola Law School
BURKE, WILLIAMS & SORENSEN
KATHERINE E. STONE

Attorneys for Amici
SANTA MONICA, LOS ANGELES, PALM SPRINGS, WEST COVINA, WEST HOLLYWOOD, CAMARILLO, OXNARD, AND CATHEDRAL CITY

**Counsel of Record*

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on September 12, 1985, I served the within *Amicus Curiae Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Laurence H. Tribe
Harvard Law School
Cambridge, Massachusetts
02138
(3 copies)

James R. Parrinello
650 California Street
Suite 2650
San Francisco, California 94108
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 12, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)